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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Celadon Laboratories, Inc.--Costs

File: B-298533.2

Date: November 7, 2008

Lawrence A. Kessner, Esq., for the protester.
Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Proposal preparation costs should not be reimbursed to the extent that the claimed hours are excessive.
 2. Hourly rates for individuals may not be the basis for reimbursement of proposal preparation costs where the rates include profit.
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DECISION

Celadon Laboratories, Inc. of Hyattsville, Maryland, requests that our Office recommend that it recover \$118,640 from the Department of Health and Human Services (HHS) for the costs of preparing its phase I proposal that it submitted in response to Small Business Innovation Research (SBIR) program solicitation No. PHS 2006-1, for the costs of filing and pursuing its successful protest in Celadon Labs., Inc., B-298533, Nov. 1, 2006, 2006 CPD ¶ 158, and for the costs of pursuing this claim.

We recommend that Celadon be reimbursed \$13,787 for its costs of preparing its proposal, as well as the costs of filing and pursuing its protest.

We sustained Celadon's protest of HHS's decision not to fund the protester's phase 1 proposal under this SBIR procurement. We concluded that the agency had failed to determine whether the evaluators of the protester's proposal had a conflict of interest where the evaluators were employed by firms that promoted a type of technology that, assertedly, was directly challenged by the type of technology offered in the protester's proposal. Because the agency stated that all of the SBIR funds for the fiscal year had been allocated and that it had no funds for additional

awards under the SBIR solicitation, we recommended that the agency reimburse Celadon for its proposal preparation costs. We also recommended that the agency reimburse Celadon for the costs of filing and pursuing its protest, including reasonable attorney's fees.

Celadon timely submitted a claim to the agency for its proposal preparation costs and its costs of pursuing the protest. Celadon claimed \$9,868 for its costs of pursuing the protest, representing 101.5 hours of Celadon's president (who is also an attorney). Celadon claimed \$100,430 in proposal preparation costs, representing the costs for three Celadon employees, including Celadon's president, who participated in the preparation of the proposal. According to the claim, these employees combined worked 1,228 hours on proposal preparation. For each employee, the claim stated a billing rate and the total of number of hours that the employee participated in the preparation of the proposal. These hours were not contemporaneously recorded by Celadon. Instead, with its claim, Celadon provided for each employee a chart identifying the hours that Celadon believed that the employee worked each day on tasks associated with preparing the proposal and generally identified the particular work performed. Celadon also submitted with its claim payroll sheets detailing the actual salary costs of the three individuals for whom reimbursement was claimed. To the total direct labor costs claimed, Celadon applied a fringe benefit rate, an overhead rate, and a general and administrative (G&A) expense rate. Agency Report (AR), Tab 2, Celadon's Claim.

By letter to Celadon, the agency advised Celadon that its claim was inadequately documented. For example, the agency determined that Celadon's claim lacked documentation that supported the hours claimed for preparation of the proposal or the hourly rates proposed for each employee. The agency also noted that since the payroll documentation did not provide hours worked or actual rates, it was impossible to determine the employees' actual hourly calculated rates because the claimed hourly rates did not correspond to the payroll information. The agency also asserted that the claimed hours appeared excessive. The agency noted that the bulk of two employees' time (and a large percentage of the president's time) for the more than 3-month period (July 20 to November 4, 2005) during which the proposal was being prepared was being charged as part of the claim for proposal preparation costs, even though the agency was aware that Celadon was working on SBIR Phase II contracts and preparing other proposals during this same timeframe. The agency concluded its letter to Celadon by requesting that Celadon "provide appropriate documentation and/or reduce it[s] cost claim appropriately." AR, Tab 3, Agency Response to Celadon's Claim (Feb. 22, 2007).

Celadon submitted a response to the questions raised by the agency. Celadon stated that it did not keep time records for activities such as proposal preparation. However, Celadon noted that it spent virtually all of the time available between July 20 and the November 4 submission date preparing its Phase I proposal, which involved a highly complex subject. AR, Tab 10, Celadon's Response and Comments to Agency Submission Regarding Celadon's Claim (Mar. 2, 2007). Celadon also

submitted additional material in support of its claimed hours: (1) a presentation prepared by NIH entitled, “Advice on NIH SBIR and STTR [Small Business Technology Transfer] Applications,” (2) copies of 58 scientific journal articles cited in Celadon’s proposal, and (3) several hundred emails sent by its employees regarding Celadon’s SBIR proposal during the relevant time frame. AR, Tab 8, Celadon’s Supporting Documentation, Scientific Research Literature; Tab 9, Email from Celadon’s Employees. The emails were submitted to document the effort of Celadon in preparing its proposal during the relevant timeframe. The NIH presentation included the statement that a Phase I “Fast Track” SBIR proposal, such as the one submitted by Celadon here, requires “at least four times the effort of a Phase I” proposal; Celadon argued that this factor may not have been taken into account by HHS in questioning the number of hours claimed by Celadon. AR, Tab 10, Celadon’s Response and Comments to Agency Submission Regarding Celadon’s Claim (Mar. 2, 2007), at 4. As to the scientific articles, Celadon states that “[w]e think that these articles, well-analyzed and cited throughout the proposal, provide better direct proof of effort spent than do certain other documents.” *Id.* at 1. In this regard, Celadon estimated that it takes a full day of work to thoroughly read and analyze two such articles, and that it would take 350 hours to review all of the material cited, which did not account for the articles that were read but not cited. Celadon’s Comments at 3.

Celadon also explained that the hourly rate that it charged for its employees was based on a 1610-hour year (230 days at 7 working hours per day).¹ Consistent with its payroll records and 1610-hour work year, Celadon claimed that the hourly rate for two of its employees (including the president) was \$67.16 per hour, but its claim was based on a lower rate of \$60 per hour for these employees because these two owner employees tended to work more hours than non-owner employees. The other employee’s claimed hourly rate was \$52.79 per hour based on this same analysis. AR, Tab 10, Celadon’s Response and Comments to Agency Submission Regarding Celadon’s Claim (Mar. 2, 2007), at 8.

Celadon also requested that HHS provide a person with technical expertise in the preparation of SBIR proposals to review Celadon’s claimed hours to verify their reasonableness. In response, HHS had two separate program officials, not associated with the review of Celadon’s proposal or associated with the previous protest, review Celadon’s documentation to assess the reasonableness of Celadon’s claimed hours for preparing its proposal. AR at 3. HHS also was concerned that in August 2005 Celadon had submitted two grant proposals containing activities similar to the proposal in question here and that the email traffic submitted by Celadon in support of its claim evidenced that the individuals that were working on the proposal in question here were involved in those grant proposals. *Id.*; see Tab 11, Contracting Officer’s Review of Electronic Mail Documentation. One HHS program official

¹ The 230 days was based on 52 weeks x 5 days = 260 days, minus 30 leave days.

concluded that “[t]he general thought is that i[t] would take a person, dealing with a scientific area with which they were familiar, no more than 80-100 hours to write a decent grant application.” AR, Tab 12, Project Officer’s Estimate of Time to Prepare the Proposal. The other agency official reviewed this Celadon proposal and Celadon’s grant proposals, and determined that there was a “tremendous overlap” between the proposals, and estimated that a “generous” estimate of Celadon’s costs to prepare the proposal would be 60 hours. AR, Tab 16, Opinion of Proposal Preparation Hours. Ultimately, the agency decided that a reasonable number of hours for Celadon’s proposal preparation was 90 hours—40 hours apiece for the two employees, who did most of the work on the proposal, and 10 hours for the president to review the proposal. AR, Tab 19, HHS Letter (Mar. 23, 2007), at 3-4; Tab 26, Claim Calculations.

Regarding how Celadon calculated the claimed hourly rates of its three employees, the agency concluded that instead of allocating salary costs between direct and indirect costs, the salary rates as calculated by Celadon were based on the direct cost portion of the salaries without regard to the indirect salary costs, e.g., 30 days vacation and 1 hour lunch, to which Celadon then applied fringe benefit, overhead, and G&A rates. AR, Tab 19, HHS Letter (Mar. 23, 2007), at 4. The agency recalculated the hourly direct salary costs, after accounting for the indirect costs, of the three Celadon employees that prepared this proposal and determined an hourly rate of \$51.92 for two of the employees, and \$40.86 for the other employee,² and for settlement purposes accepted Celadon’s proposed fringe benefit, overhead, and G&A rates.³

The agency determined that Celadon should be allowed 60 hours for the president’s time in pursuing the protest, but has provided no explanation as to how it determined this figure or why the president’s claimed 101.5 hours for pursuing the protest were excessive. AR, Tab 26, Claim Calculations. The agency also used the \$51.92 hourly rate that it had calculated for the president, instead of the \$67 rate on which Celadon’s claim was based. Id.; Tab 2, Celadon’s Claim.

In sum, the agency determined that Celadon should be reimbursed \$10,660 (\$6,139 for proposal preparation costs and \$4,521 for the costs of pursuing the protest). AR, Tab 26, Claim Calculation. The agency offered this amount in settlement of this claim to Celadon, which rejected the offer. After some time where the parties

² The agency calculated the hourly direct salary cost by multiplying the semi-monthly salary “by the 24 pay periods and divided by 2,080 hours per year. Based on the explanation provided, 1 hour per day for lunch is an indirect cost and 7 hours are direct costs.” AR, Tab 19, HHS Letter (Mar. 23, 2007), at 4.

³ The agency did express doubt about whether these indirect cost rates were supported.

further discussed the claim, on December 3, Celadon requested that our Office recommend that it be reimbursed \$118,640 for its proposal preparation costs, its costs of pursuing the protest, and its costs of pursuing the claim.

A protester seeking to recover the costs of preparing a proposal or bid must submit sufficient evidence to support its monetary claim. John Peeples--Claim for Costs, B-233167.2, Aug. 5, 1991, 91-2 CPD ¶ 125 at 3. The amount claimed may be recovered to the extent that it is adequately documented and shown to be reasonable. Maintenance and Repair--Claim for Costs, B-251223.4, June 24, 1994, 94-1 CPD ¶ 381 at 3-4. Although we recognize that the requirement for documentation may sometimes entail certain difficulties, we do not consider it unreasonable to require a protester to document in some manner the amount and purposes of its employees' claimed efforts and to establish that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3.

Celadon asserts that the claimed hours for its employees to prepare its proposal "was a good faith reconstruction of the actual time spent," noting that the proposal involved a highly complex subject and that Celadon "spent virtually all of the time available, between the July pre-release date and the November submission, in preparing it." Celadon's Comments at 1; AR, Tab 10, Celadon's Response and Comments to Agency Submission Regarding Celadon's Claim (Mar. 2, 2007), at 4. According to Celadon, the fact that proposal preparation costs were greater than the value of the Phase I contract value was irrelevant because instead of looking solely at the \$100,000 SBIR Phase I as the goal, Celadon was looking at the \$850,000 combined Phase I/II contract, and the further opportunity to commercially develop Locked Nucleic Acid products (the basis of its proposal), which could result in a new product line worth much more than the face value of the contract. Celadon's Comments at 1.

However, the agency has noted a variety of issues that caused it to conclude that Celadon's claimed hours were excessive, besides the fact that the claimed cost exceeded the Phase I award amount. As noted above, the agency's subject matter expert examined the Phase I proposal submitted in this matter and the grant proposals prepared by Celadon at approximately the same timeframe, and concluded that there was a "tremendous overlap" in the subject matter of the two proposals. AR, Tab 16, Opinion of Proposal Preparation Hours. While Celadon asserts that it has "prove[d]" that its SBIR proposal is different from the grant proposals submitted during same timeframe, the only evidence that it has submitted to our Office in support of this assertion is a claim that an on-line service provided "paper authorship integrity" through the use of software that conducts side-by-side comparisons of submitted papers, which assertedly indicated that there was no significant or

substantive similarity between the two proposals.⁴ Celadon's Comments at 2-3. Moreover, the agency's analysis of the emails provided by Celadon in support of the claim indicated that the employees were working on activities other than this proposal during the timeframe where they were assertedly devoting virtually all their time to preparing Celadon's SBIR proposal. See AR, Tab 19, HHS Letter to GAO (Mar. 23, 2007), at 2. All of these matters raise doubts as to the validity of the hours claimed by Celadon.

The agency also asserts that during this timeframe the employees in question were supposed to be working on a Phase II SBIR contract and the agency had not been advised that these employees were instead writing this Phase I proposal. Specifically, the agency questioned how one of Celadon's employees could have devoted almost all of his time during the late July to early November 2005 period to the Phase I proposal and, at the same time, according to a Certificate of Current Cost and Pricing Data for the Phase II contract prepared on June 1, 2005, also devote 50 percent of his time to the Phase II contract. AR, Tab 19, Agency Letter (Mar. 23, 2007) at 3. While Celadon now asserts that these employees actually completed their work on the Phase II contract prior to preparing the Phase I proposal here, Celadon's Comments at 4, this also raises questions about the hours claimed.

As noted, Celadon also provided copies of numerous scientific articles that, it argues, provide "better direct proof than do certain other documents" of the considerable effort spent in preparing this proposal. AR, Tab 10, Celadon's Response and Comments to Agency Submission Regarding Celadon's Claim (Mar. 2, 2007), at 1. Indeed, a large portion of the proposal preparation costs represent hours spent by Celadon's employees reading these and other articles. AR, Celadon's Claim. However, the agency found that many of the scientific journal articles that Celadon cited in its Phase I SBIR proposal were previously cited in at least one other contract proposal and the two grant applications that were prepared prior to the preparation of the proposal at issue here, and that some of the articles were authored or co-authored by Celadon's employees or collaborators named in Celadon's proposal. AR, Tab 19, HHS Letter (Mar. 23, 2007), at 3. Moreover, it would appear that the knowledge gained from the scientific journal articles was necessary for Celadon's overall business and reading these articles was not solely for the purposes of preparing its SBIR proposal. See Stocker and Yale, Inc.--Claim for Costs, B-242568; B-242568.3, May 18, 1993, 93-1 CPD ¶ 387 (where we agreed with the agency's denial of the protester's costs incurred to obtain product's inclusion on a qualified products list (QPL) were not reimbursable as proposal preparation costs because the protester failed to argue that the investment represented by its QPL-related expenses was of value only in the preparation of its proposal).

⁴ Although we have not reviewed the contents of these proposals (which were not provided to our Office), for the reasons explained in this decision, we are unable to find the agency's concern in this regard to be unreasonable.

Based on our review of the record, we agree with the agency that the number of hours claimed in preparing this Phase I proposal appear excessive, particularly considering that Celadon did not contemporaneously record the hours specifically allocated to this Phase I proposal or otherwise carry its burden of showing that its claimed hours were reasonable. Where our Office has found that the number of hours exceeded that which a prudent person would claim, we have reduced the number of hours to reflect a reasonable work effort, given the nature of the particular protest. See SKJ & Assocs., Inc., B-291533.3, July 24, 2003, 2003 CPD ¶ 130 at 3. Here, given the statements of the HHS program officials as to what are reasonable hours for preparing an SBIR proposal of this nature, and in the absence of any better evidence, we accept as reasonable the agency's determination to allow 40 hours for the two employees to prepare the proposal, and 10 hours for the president to review it.

We also accept the agency's calculation of the rates for the three Celadon employees who prepared the proposal. As indicated by the agency, while Celadon supported the salaries paid its employees, it used a flawed method to calculate its claimed hourly labor rates based on these yearly salaries. That is to say, Celadon's calculations resulted in including indirect costs, e.g., vacation time and paid lunch, in its direct labor rates. Celadon does not dispute this agency analysis. Thus, when Celadon applied the fringe benefit, overhead and G&A rates to its claimed labor rates, which should account for all of the indirect costs, Celadon was essentially double-counting the indirect costs included in the labor rates. This double-counting had the effect of including profit in addition to actual costs in Celadon's proposed labor rates. A protester may not recover profit on its employees' time in filing and pursuing protests, and, therefore, claimed rates must be based upon actual rates of compensation, plus reasonable overhead and fringe benefits, and not market rates that include profit as an element. W.S. Spotswood & Sons, Inc.—Claim for Costs, supra.

In sum, we recommend that Celadon be reimbursed its proposal preparation costs for 40 hours at \$51.92 for one employee, for 40 hours at \$40.86 for another employee, and for 10 hours at \$51.92 for the president. After Celadon's claimed indirect rates are applied to these direct labor costs, the total reasonable proposal preparation costs, as was determined by HHS, is calculated as \$6,139. AR, Tab 26, Claim Calculation.

Celadon also claims \$9,868 for its costs of pursuing the protest, representing 101.5 hours of Celadon's president's time at \$67 per hour, plus applicable indirect costs. AR, Tab 2, Celadon's Claim. The agency only allowed 60 hours at \$51.92 per hour. AR, Tab 26, Claim Calculation. For the reasons stated above, we accept the agency's determination that the president should be reimbursed at the \$51.92 rate. However, the agency has not specifically contended that the 101.5 hours charged by the president for pursuing the protest are excessive, and based on our review of the record, we find no basis for so concluding. Thus, we find that Celadon should be

reimbursed \$7,648 for its costs of pursuing the protest, which represents 101.5 hours of the president's time at \$51.92 per hour, plus indirect costs at the claimed rates.

Finally, Celadon's claim seeks reimbursement of \$8,640, reflecting time spent on the preparation of Celadon's cost claim at the agency. However, while our Bid Protest Regulations provide that we can recommend reimbursement of the costs of pursuing a claim for protest costs at our Office, 4 C.F.R. § 21.8(f)(2), there is no provision providing for reimbursement of costs of preparing and pursuing a claim at the procuring agency. Manekin Corp.--Costs, B-249040.2, Dec. 12, 1994, 94-2 CPD ¶ 237 at 6. To the extent Celadon requests that it be reimbursed the costs of pursuing its claim at our Office, we will make such a recommendation only if it is shown that the agency unreasonably delayed consideration of the protester's claim or otherwise failed to give the claim reasonable consideration. Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 7. Here, since we have essentially agreed with the agency's determination of the amount of costs which Celadon should be reimbursed and find any delay in resolving the claim was substantially contributed to by Celadon's actions, we do not recommend that its costs of pursuing the claim at our Office be reimbursed.

We recommend that Celadon be reimbursed \$13,787 as the reasonable costs of proposal preparation and filing and pursuing its protest.

Gary L. Kepplinger
General Counsel